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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 252.

HIPPOLITE FILHIOL ET AL., PLAINTIFFS IN ERROR,

vs.

GEORGE H. TORNEY.

BRIEF FOR THE PLAINTIFFS IN ERROR.

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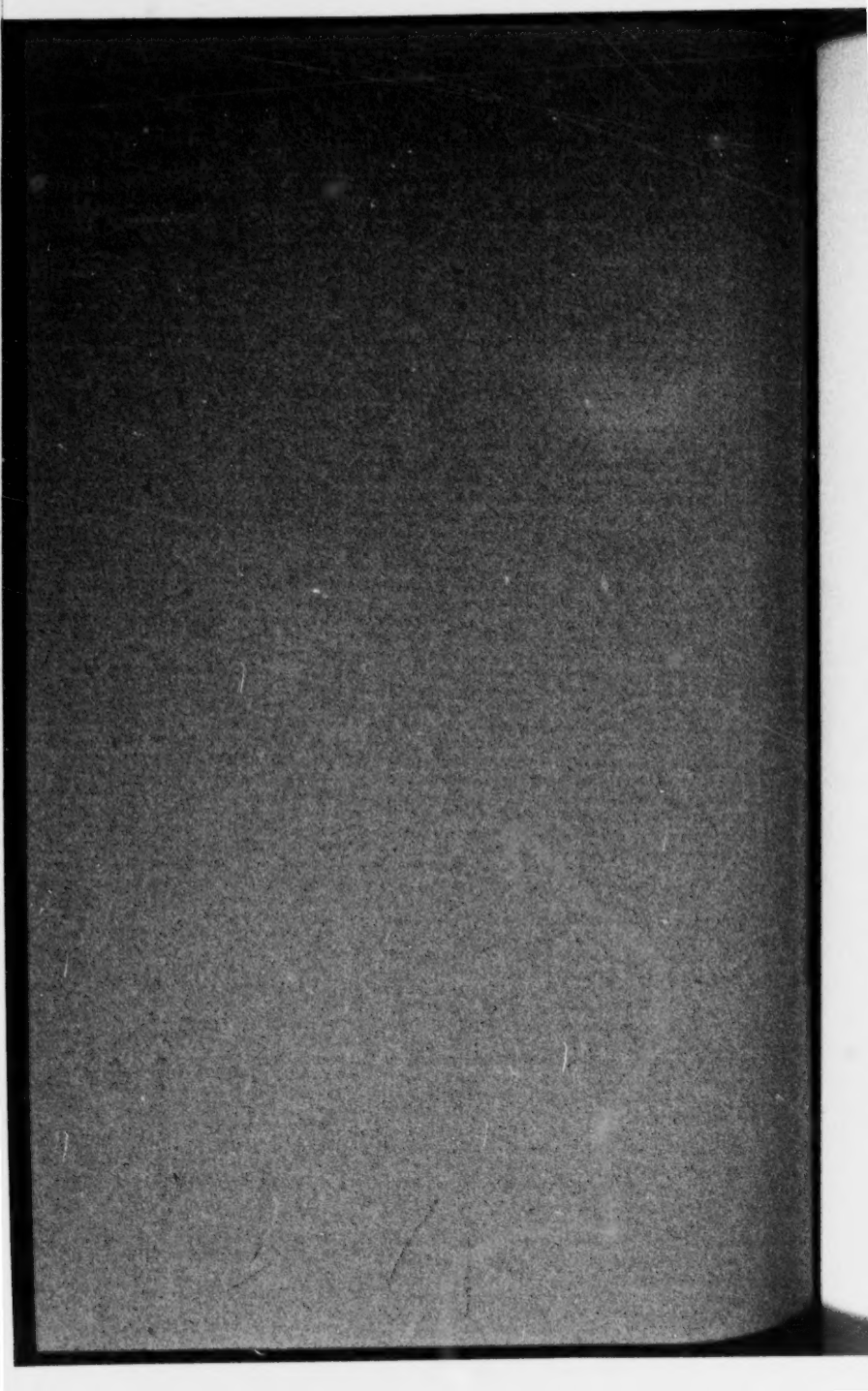
(17,734.)



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STATEMENT OF CASE.

This suit was brought by the plaintiffs, as the heirs and descendants of Don Juan Filhiol, for the possession of a certain tract of land in Garland county, Arkansas, embracing all the hot springs in the city of Hot Springs, in that State.

The source of plaintiffs' title was a grant by Don Estevan Miro, governor of the then Spanish colony of Louisiana, made February 22, 1788. The complaint sets out that on December 12, 1787, Filhiol memorialized the governor of the province of Louisiana and West Florida for a grant of land of which the governor thereupon ordered a survey to be made by Don Carlos Trudeau, the then surveyor general

of the province, which survey was made in execution of this order prior to February 22, 1788, the date of the grant; that Trudeau made a report of his survey, with a figurative plan and procès verbal thereof, in due form, in which the land was described as follows:

"A tract of land, with a front of eighty-four arpents, and a depth of forty-two arpents, on each side of the stream, called La Source d'Chaude, about two leagues distant from its entrance into the Ouchita, having the Hot Springs for its center, its limits extending in parallel lines, east and west, to its full depth, and bounded on both sides by land belonging to the Crown."

The complaint further sets up that the survey, figurative plan, and procès verbal had been lost or destroyed and could not be produced by plaintiffs, but that on February 22, 1788, Miro, the governor of the province, made and delivered to Filhiol a grant for a certain league of land, which said grant was in words and figures as follows, to wit:

" *The governor and intendant of the province of Louisiana and West Florida and inspector of troops, etc.:*

" Having examined the proceedings had (or acts done) by the surveyor of this province, Don Carlos Trudeau, concerning the possession which he has given to Senor Don Juan Filhiol, commandant of the post of Ouchita, of a tract of land of one league square, situated in the district of Arkansas on the north side of the River Ouchita, at about two leagues and a half distant from the said River Ouchita, and understanding that this land is to be measured so as to include the site or locality known by the name of Hot Waters, as is besides expressed by the figurative plan and certificate of the said Surveyor Trudeau above named, and recognizing the same in conformity to the order of survey, we approve those surveys using the faculty which the king has vested in us, and we grant in his royal name, unto the said Juan Filhiol the said league of land in order that he may dispose of the same, and the usufruct thereof as his own.

" We give these presents under our own hand, sealed with the seal of our own arms, and attested by the undersigned

secretary of His Majesty in this government and intendance.

"In New Orleans on the 22d day of February, 1788.

"(Signed) [L. S.] ESTEVAN MIRO.

"By mandate of His Excellency.

"(Signed) ANDES LOPEZ ARMISTO.

"Registered."

Plaintiffs further allege that this grant was made to their ancestor while he was acting as commandant of the post of Ouchita as a reward for his civil and military services in that character; that Miro, in his capacity as governor general, was by the Spanish colonial laws then in force vested with authority to make grants of land, and to convey by said grants the absolute fee-simples to the land thus granted; that after the making and delivery of the said grant by Miro to Filhiol, on December 6, 1788, Carlos Trudeau, the surveyor general of the province, executed and delivered a certificate of measurements of the land thus granted to Filhiol; which certificate, translated into English, was in the following terms:

"Don Carlos Trudeau, land and particular surveyor, of the province of Louisiana, in consequence of a memorial signed on the 12th day of December, in the year 1787, by Don Juan Filhiol, commandant of the post of Ouchita, and by order of His Excellency Don Estevan Miro, brigadier of R. ex-gob., intendant of the province of Louisiana, West Florida etc., dated the 22nd of February 1788, directing me to give possession to the aforesaid commandant, of a tract of land of one league square, situated in the district of Arkansas, to include that spot known by the name of Warm Waters, and in conformity with the aforesaid order, I certify having measured in favor of the aforesaid commandant, Don Juan Filhiol, the league of land indicated in the memorial situated on the north side of the Ouchita river, in the district of Arkansas, at about two leagues and a half distant from said river, to be verified by the figurative plan, which

accompanies in conformity with —— of the 6th of the present month of December and of the current year 1788.

"(Signed) CARLOS TRUDEAU."

That the making and delivery of this certificate was a delivery of the judicial possession of the land and had the force and effect of segregating the same from the public domain, and, along with the grant already set out, vested full and complete title thereto in the grantee.

The complaint further shows that Filhiol, on November 25, 1803, by a deed or act of sale passed before Don Vincente Fernandez Texeir, sold and conveyed the land described in the grant of Governor Miro to his son-in-law, Narcisso Bourgeat, which deed was witnessed by the Baron de Bastrop, of Ouchita, and Don Jose Pomet, who signed the act in the presence of Don Alexandre Breard and Don Carlos Bettin, all of whom were principal men in Ouchita at the date thereof; that the said deed, when translated into the English language from the Spanish language, was in the terms following, to wit:

"Be it known, to all to whom this act may come, that I Don Juan Filhiol, captain in the army, commandant of the militia, of this district, do authenticate that I really and effectually do sell to Narcisso Bourgeat, my son-in-law and resident of this district, a tract of land with a front of eighty-four arpents, and a depth of forty-two arpents on each side of the stream called 'La Source d'eau Chaude,' about two leagues distance from its entrance into the Ouchita, having the hot spring for its center; its limits extending in parallel lines east and west to its full depth, and bounded on both sides by lands belonging to the Crown, the same, which belongs to me by virtue of a grant obtained from Senor Don Estevan Miro, then governor of these provinces, dated the 12th day of December 1777. I sell the same to the abovenamed Bourgeat with all its ways of entrance and exits, uses stated customs and servitude, free from all charge and mortgage, for the price of one thousand two hundred dollars, good money, which he has paid me in cash, for which sum I acknowledge the receipt, and to obviate the actual receipt

thereof at this moment, I renounce the exception of *numerata pecunia* and do formally authenticate that I receive it; wherefore I abandon and relinquish all title, possession use, dominion of seignory I may have had, or hold in and to the said tract of land, and do grant and renounce in favor of, and transfer to this purchaser all such title and rights thereto, and in whom such a right and title may be, that he may possess, sell, exchange, alienate, according to his own wish, and set forth in this writing which I pass in his favor, in testimony of real delivery of said property, so that it may be seen and understood that he acquires possession thereof without any other proof of which he is hereby relieved, and to secure him against eviction and to insure the reality and perfection of this sale, I hereby affect and obligate thereto all the property, I now have, or may hereafter have, and do hereby insert the clause of full guaranty, and do renounce all laws in my favor in general and in particular, and being present at the passing of this act, I, the above-named Narcisso Bourgeat, accept the same acknowledging to have purchased the said land in quantity and shape as herein sold to me, and which I accept as a delivery and formally acknowledge the possession, in testimony of which this deed is passed, in the district of Ouchita on the 25th day of the month of November one thousand eight hundred and three.

"I, Don Vincente Fernandez Texeir, lieutenant of the regiment of infantry of Louisiana and military and civil commander of this district and jurisdiction, certify that I know the contracting parties hereto, which act is affirmed by Senor Baron de Bastrop and Don Jose Pomet, who are present assisting, in the presence of Don Alexander Breard, Don Carlos Bettin and Don Francisco Cavet all of whom are residents of this district.

"The interlineation Cavet is part of this act and the erasure Bettin is not.

"(Signed) JUAN FILHIOL.
"(Signed) NARCISSO BOURGEAT.

"Done within my jurisdiction.
"(Signed) VINCENTE FERNANDEZ TEXEIR.

"BARON DE BASTROP.
"J'E POMET.

The complaint further avers that this deed was immediately thereafter "reported in proper office of the province of Louisiana in accordance with law," and there duly recorded.

It is then alleged that on July 17, 1806, by a deed passed before J. Poydras, the lands were retroceded by Bourgeat to Filhiol, which act of retrocession was recorded in the office of the recorder of the parish of Pointe Coupee, in the State of Louisiana, July 17, 1806; that this act or deed, translated from the French language, in which it was executed, into the English language, was as follows, to wit:

"I, the undersigned, Narcisso Bourgeat, retrocede by these presents to Monsieur Juan Filhiol, a piece of land three leagues front and one in depth, situated on the Bayou Darquelon, and one also of a league square, situated at the source of the hot water of the Ouchita, the which lands he sold to me by deed given before Don Vincente Fernandez Texeir, commandant at that time at said Ouchita, and which I return to him for the same price and sum which he had parted with to me, and which he has reimbursed me, and therefore I hold him released in order that he may enjoy it, appertaining his right, in behalf of which I have signed at Pointe Coupee the seventeenth day of July, one thousand eight hundred and six.

"(Signed) NARCISSO BOURGEAT."

"I certify that the presented retrocession has been made in my presence the same day as that above.

"(Signed) J. POYDRAS,

"*Judge of the Court of Pointe Coupee.*"

Proceeding, the complaint further shows that at the time of the execution by Filhiol of the transfer or conveyance of the land by him to Bourgeat, in accordance with the requirements of the Spanish law, he actually produced before Texeir, lieutenant of infantry and military and civil commander of the district of Ouchita, all his title papers, including the certificate of survey, figurative plan, procès verbal, grant, etc., the same having been found to be valid,

and that all these papers were produced before the officer by whom and in whose presence was passed the subsequent act by which Bourgeat retroceded the property to Filhiol, and were then and there delivered to Filhiol.

The complaint sets out the further statement that Filhiol, plaintiffs' ancestor, in 1819 leased the said Hot Springs to one Dr. Stephen P. Wilson for five years; that shortly after thus leasing to Wilson, to wit, in the year 1821, Filhiol died; that since his death plaintiffs have always urged their title to the property and employed agents and attorneys to do so for them, but they have been during the greater part of this time embarrassed by not having possession of the said original grant, this having been in the hands of one Resin P. Bowie, a distinguished lawyer of the times, but that after his death, in 1843, after much diligent search, the said grant was found among his effects, or those of his widow, in 1883, by Mrs. Mathilda E. Moore, of the parish of Orleans, Louisiana, who was a daughter of the said Narcisso Bourgeat, and by Marie Barbe Filhiol, a granddaughter of Don Juan Filhiol.

The complaint closes with other allegations concerning the cause of action set up, which it is unnecessary to repeat here.

This complaint the defendant met in the lower court with a general demurrer, to the effect that the allegations of the complaint did not constitute a cause of action.

The circuit court having maintained the demurrer and dismissed the complaint, this writ of error was taken out by plaintiffs.

AS TO THE JURISDICTION.

This court has jurisdiction in the present case.

The petition or declaration of the plaintiffs sets forth (R., 11 and 12) that by the third article of the treaty between the United States and the Republic of France ratified on October 21, 1803, the inhabitants of the province of Louisiana

were protected in the free enjoyment of their property; that by effect of this treaty provision the inhabitants of the Territory of Louisiana were fully protected in all their rights, complete and perfect, choate or inchoate, and any act of any person claiming to proceed under the authority of the United States was in contravention of such treaty.

Morrison *vs.* Whetstone, 5 La. An. Rep., 636–638.
United States *vs.* Reynes, 9 H., 127–151.

The petition or declaration proceeds to say that a just construction of the treaty extended to the property of Filhiol, plaintiffs' ancestor, and also to the rights of plaintiffs, his heirs, but that, nevertheless, denying that the plaintiffs were entitled to be maintained and protected in their property by any construction of the treaty, the United States asserted title to the lands sued for by virtue of the general cession to it of the province of Louisiana, without regard to the exception contained in said treaty, under which plaintiffs claim.

That, by its officers or agents, the United States expelled the plaintiffs from the possession of the land, part and parcel of the grant of their ancestor, without making compensation therefor, and established the defendant, one of its officers, in such possession; that the defendant has remained in such possession as superintendent of the United States Army and Navy hospital, ousting the plaintiffs in denying their rights to the premises, by direction of the United States.

Plaintiffs alleging that their cause of action arises out of the treaty and draws in question its construction.

It is further declared that the United States has deprived them of their property without any process of law or any legal right to do so, and has made no compensation to plaintiffs for the public use of their property; that in consequence the cause of action arises under the Constitution of the United States and involves the application thereof for the protection of the just rights of plaintiffs.

Under these allegations this court has jurisdiction.

The question here is, first, whether or not the rights set up by plaintiffs were protected by the treaty between France and the United States of 1803; and, second, whether or not, under the Federal Constitution, they were entitled to compensation for the use of their property taken, as is set out, by the United States for public use.

In a case where the issue is whether certain acts amounted to a crime under a treaty this court has taken jurisdiction.

Tenlinden *vs.* Ames, 184 U. S., 270–282, *et seq.*

In Rice *vs.* Ames, 180 U. S., 371–374, this court took jurisdiction in a case involving the question whether or not the provisions of a treaty applied to an affidavit describing a supposed extradictable offense.

In Ornelas *vs.* Ruiz, 161 U. S., 502–507, it was held that in such a case the construction of the extradition treaty was involved, and the appeal was properly taken to this court.

In Florida *vs.* Furman, 180 U. S., 402–427–428, where the question was whether a certain alleged title under a Spanish grant was protected by treaty, that the appeal to this court could be maintained for the reason that it involved the construction of a treaty. (See pp. 427–428.)

In Filhiol *vs.* Maurice, 185 U. S., 108, *et seq.*, it was decided that the acts set up by the petition, or declaration, stated a case which arose under the Constitution or laws of the United States, and was one in which a writ of error was properly taken direct to the circuit court from this court.

185 U. S., 110.

The court, on the merits, however, decided that upon its examination of the case it was met with the question whether or not the jurisdiction of the circuit court could have been maintained irrespective of adverse citizenship, and the conclusion of the court was that such jurisdiction could not be maintained.

185 U. S., 111.

It was declared that it must appear from the plaintiffs' own statement that the case was one which arose under the Constitution or the treaties of the United States in order to confer such jurisdiction, and, the court being of the opinion that such was not the case, it was declared that the circuit court should have dismissed the suit.

It is respectfully submitted that the omissions found to be fatal in the cited case have been supplied in the case at bar.

This is found in the petition or declaration, which declares that although the plaintiffs were entitled to be maintained and be protected in the enjoyment of the property sued for under any construction of the treaty, that the United States asserted title by virtue of the said treaty without regard to the exception found in the third article thereof, and, also, that the United States had deprived plaintiffs of the property sued for without due process of law, and without any legal right had taken the same for public use without making any compensation therefor, and thus a cause of action arose under the Constitution and involved its application for the protection of plaintiffs' just rights.

These allegations would give the circuit court jurisdiction.

ASSIGNMENT OF ERRORS.

1. The circuit court erred in rendering the said judgment upon the record.

2. The said circuit court erred in sustaining the demurrer to the complaint in said action and in not overruling the same.

3. The said circuit court erred in holding that such court was without jurisdiction to hear, try, and determine said action.

4. The said court erred in holding that the allegations in the complaint were or are insufficient to confer jurisdiction as of an action arising under the treaty with France, set up in said complaint.

5. The said court erred in holding that the allegations in the complaint in said action were or are insufficient to show a cause of action arising to the plaintiffs against the defendant by virtue of the third article of the said treaty with France.

6. The said court erred in holding that the allegations in the complaint in said action were or are insufficient to confer jurisdiction as of an action arising under the Constitution of the United States, as set up in the said complaint.

7. The said court erred in holding that the allegations of the complaint in said action were or are insufficient to show a cause of action in favor of the plaintiffs and against the

defendant, arising to the plaintiffs by virtue of the Constitution of the United States in the provisions of the fifth amendment thereof.

8. The said court erred in holding that the plaintiffs were not entitled to recover the premises described in the complaint according to the allegations thereof and the prayer for a judgment therein contained.

9. The court erred in divers other matters manifest upon the face of the record of said action.

ARGUMENT.

For the reversal of the judgment of the circuit court plaintiffs rely upon certain errors contained in the judgment of the court *a qua*, which were set out in the assignment of errors, on pages 17 and 18 of the record.

The first assignment is as follows:

"The court erred in holding that the grant made to Don Juan Filhiol and the figurative plan, procès verbal, and survey and certificate of the surveyor general set forth in the complaint of the plaintiffs in error, did not vest in the said Filhiol, a legal and equitable title to the land in controversy, which was guaranteed and protected by the provisions of the treaty between the United States and France, ratified on the twenty-first day of October, 1803."

The grant to Don Juan Filhiol was made by Governor Estevan Miro on February 22, 1788. (See Record, page 4.)

Miro, the Spanish governor of Louisiana, had power to grant lands within the province, which at the date of the grant in question included the territory now constituting the State of Arkansas. Such authority of Governor Miro has been affirmed by the supreme court of Louisiana, which has had frequent occasion to consider and adjudicate upon the character and effect of titles granted by the French and Spanish governors of Louisiana.

Murdock *vs.* Gurley, 5th Robinson (La.) Rep., page 457 *et seq.*

Choppin *vs.* Michel, 11 Robinson (La.) Rep., 240.

Davis *vs.* Police Jury, 19th La., 541.

Strother *vs.* Lucas, 12 Peters, 437, 438.

It has been held that the courts would take judicial notice without proof of the signatures of the French and Spanish governors and the higher officials of the colony; that if any doubt existed as to the authenticity and genuineness of such signatures or as to the authority of the officer, the burden of proving fraud or want of authority devolved on the party making the objections.

Choppin *vs.* Michel, 11th Robinson (La.) Rep., 240.

Smythe *vs.* N. O. C. & B. Co., 93 Federal Reporter, 914, 915.

Hays *vs.* Berwick, 2d Martin (La.) Rep. (old series), 138, 139.

Davis *vs.* Police Jury, 19 Louisiana Reports, 541.

Davis *vs.* Police Jury, 1st La. Annual Reports, 294, 295.

The certificate of Andres Lopez Armesto that the grant is "By mandate of His Excellency," following the signature of Governor Miro, must be given its full effect, which would include the verity of his official declaration that the grant

was made by the governor, as set out in the instrument which he countersigned.

That there had been a prior survey by Trudeau cannot be disputed, because the grant expressly declares that it was made. It begins with the declaration that the governor "having examined the proceedings (or acts done) by the surveyor of this province, Don Carlos Trudeau, concerning the possession of which he has given to Senor Don Juan Filhiol, commandant of the post of Ouchita, of a tract of land," etc.

However, the inability of plaintiffs to produce the surveyor's plan and procès verbal of Trudeau, made prior to the grant, is compensated by the survey of Trudeau, made December 6, 1788, nearly one year after the grant itself, which was made February 22, 1788. The certificate of Trudeau that he had made such a survey and *delivered possession of the land* to the grantee expressly declares that he did so by order of Governor Miro, upon the petition of Filhiol, presented to him, the governor, December 12, 1787. The declaration of Trudeau is that he measured in favor of Filhiol the league of land indicated in the latter's memorial, situated "on the north side of the Ouchita river, in the district of Arkansas, about two leagues and a half distant from the said river," which he declares to be verified by the figurative plan which accompanies it. It will be noted that the description of the land found in Trudeau's certificate agrees with that which appears in Governor Miro's grant, both declaring, among other facts, that it is to be so measured as to include the spot known by the name of "Hot Waters," as expressed in the grant; "Warm Waters," as set forth in the certificate.

The grant of February 22, 1788, sufficiently shows *prima facie* a divestiture of the Spanish king's title to the land which it describes and a vesting of it in Filhiol, the grantee. It is in terms translative of property, since it declares that Governor Miro, "using the faculty" the king had

vested in him, in his royal name granted to Filhiol "the said league of land, in order that he may dispose of the same, and the usufruct thereof, as his own." If the description set out in the grant itself may be considered as not fully and completely identifying the land, such defect, if it exists, is supplied by its reference to the figurative plan and certificate of survey, previously made by Trudeau, the surveyor general of the province, which the governor recognizes as "in conformity to the order of survey" made prior to the grant. The governor says in the grant, "We approve those surveys." There are thus called in aid, if such be required, of the description found in the grant itself the exact measurements of the government surveyor, made in his official capacity, in conformity to the governor's order for the making of the same. That such survey was made is established by Miro's approval of it, it being a reasonable presumption that his approval would not have been given to a survey which had never been made; but, on the contrary, that the location, measurements, and plan of Trudeau were before him and were examined before their approval.

The opinion of the circuit court is not found in the record, in consequence of which there is nothing before this court to show the line of reasoning by which the court below reached a conclusion adverse to the plaintiffs. In the absence of any statement of the grounds upon which rested the judgment of the court below, we will assume that the grant was held invalid in the present case, upon the same grounds upon which a similar conclusion was reached by the same court in Muse *vs.* Arlington Hotel Company, 68 Federal Rep., 637, in which case the same grant was under examination.

The Filhiol grant in that case was held imperfect and incomplete by reason of a non-compliance with the twelfth section of the regulations of Alexandro O'Reilley, the first Spanish governor of Louisiana, promulgated February 18, 1770, which was as follows:

"All grants shall be made in the name of the king by the governor general of the province, who will at the same time appoint a surveyor to fix the bounds thereof, both in front and depth, in the presence of the judge ordinary of the district and of two adjoining settlers, who shall be present at the survey. The above-mentioned four persons shall sign the procès verbal, which shall be made thereof. The surveyor shall make three copies of the same, one of which shall be deposited in the office of the scrivener of the government, another shall be directed to the governor general, and a third to the proprietor to be annexed to the title of his grant."

The demurrer to the complaint filed in the lower court should have been overruled, since at the most the case disclosed by the complaint could have only failed, if at all, for the want of sufficient proof on the trial of the merits. The complainants have averred every fact which appears on the face of the grant, or which may be reasonably and fairly inferred from what is therein particularly set forth. The grant affirms that there had been an order for a survey prior to its date; that such survey had been made in conformity with the order, and that it had been approved by the governor. Whether or not these facts are sufficiently established by the recitals of the grant is a question which pertains to the merits of the cause, but not the adequacy of the complaint as stating a cause of action.

The facts that a survey of the land had been made by Trudeau in compliance with the governor's order to that end, both prior and subsequent to the execution of the grant, and that at this survey he made a figurative plan and certificate, to which the approval of the governor had been given, are declared by the grant in positive terms. Upon the demurrer, these facts are not open to dispute or question.

If a prior survey, made pursuant to an order of Miro, was a necessary condition to the validity of the grant, the existence of these conditions was to be ascertained by Miro before the grant was made. The express declaration of the latter

that all of the steps had been taken may be accepted as evidence that they had been accomplished.

1st Greenleaf on Evidence, section 20, 144.

The circumstance, therefore, that plaintiffs do not file with their complaint the survey, figurative plan, and procès verbal of Trudeau, which are mentioned in it, in no respect diminishes the strength of case disclosed by the complaint. In any event, there is ample authority for the statement that everything set out in the grant as a fact, if it be necessary for its validity, is fully established by the recital of the grant itself. Besides other facts appearing upon the face of the grant, should be noted the language with which it begins, this declaring that Filhiol was already in possession of the grant ceded, such possession having been given him by Trudeau at a date anterior to the governor's grant. It may be presumed that the possession thus declared in Filhiol was the possession of the distinct, determinate body of land of which the governor designed to convey the king's title; that the possession given by Trudeau was of a tract of land which had been clearly defined by boundaries and measurements ascertained by himself in the discharge of his official duty.

The recitals and declarations of the grant in this connection, so far as they disclose facts, are original evidence thereof, being within one of the exceptions to the admissibility of hearsay evidence, as to ancient documents.

1st Greenleaf on Evidence, page 141, sections 141, 142, *et seq.*

Conceding, however, for the sake of argument, that we must look solely to the terms of the grant itself for a description of the property, sufficient in terms to identify it, unaided by the sources of information indicated by the references contained in it, and assuming also, for the moment, that its terms of description do not identify the land with

sufficient particularity, there is found in the record another muniment of title, which shows that it was located, ascertained, and delimited by competent authority. It appears by the certificate of Trudeau, the surveyor, that he measured the league of land indicated in the memorial, situated "on the north side of the Ouchita, in the district of Arkansas, at about two and one-half leagues distance from said river" (terms corresponding with those used by the grant in describing the land), which measurements are verified by a figurative plan, which accompanied his report or procès verbal of December 6, 1788.

See Record, pages 4 and 5.

The significance and effect of Trudeau's surveys have been well settled by decisions of the supreme court of Louisiana and of the Federal courts. They have been recognized and acted upon in the reports of land commissioners, acts of Congress confirming grants, by the land authorities of the United States, and by the officers of the Department of Interior.

United States *vs.* Hanson, 16 Peters, 200, 201.

United States *vs.* Boisdore, 11 Howard, 91, 92.

Smythe *vs.* New Orleans Canal & Banking Company, 93 Federal Reporter, 919, 920.

Decision of the Secretary of the Interior in New Orleans Canal & Banking Company *vs.* State of Louisiana, rendered January 18, 1884.

Decision of the Commissioner of the Land Office in the "Malines case," 2d Copp's Land Owner, page 21 *et seq.*, especially page 22.

In Litchworth *vs.* Bartels, 4th Martin (La.) Reports, New Series, 136, it was held that a plat or plan certified by Trudeau, surveyor general of the province, was legal evidence in support of title to the land surveyed.

It should be remembered that the survey, the certificate of which is found in the record, was not the one which was made prior to the grant, because it declares that it is made "by order of His Excellency, Don Estevan Miro, brigadier of the R. ex-gob., intendant of the province of Louisiana, West Florida, etc., dated February 22nd, 1788," which is the date of the grant itself. Affirmative evidence is afforded by the terms of this latter, and it was preceded by another survey made by Trudeau at an antecedent date, evidently for the purpose of ascertaining whether the land described in Filhiol's memorial was at the place where the latter declared it to be, and, if so, to locate it and fix the boundaries. The subsequent proceedings of Trudeau, described in his return or certificate of December 6, 1788, were posterior to the grant of Governor Miro.

The procès verbal of Trudeau declares that it is made in consequence of a memorial addressed by Filhiol to Governor Miro, December 12, 1787, and by an order of the latter to him, Trudeau, dated February 22, 1788, to give Filhiol possession of "a tract of land of one league square, situated in the district of Arkansas, to include that spot known by the name of Warm Waters." The procès verbal further declares that in conformity with the order of the governor he, Trudeau, had measured in favor of Filhiol the league of land indicated in the memorial, situated on the north side of the Ouchita river, in the district of Arkansas, about two leagues and a half distance from the said river, to be verified by the figurative plan. This description of the land, actually measured by Trudeau, is in coincidence with that which is found in the grant of Governor Miro.

But no departure by Governor Miro from the procedure directed by the 12th section of O'Reilly's regulations could in any manner affect the validity of a grant made by Miro, or diminish its force and effect; the authority of O'Reilly, as governor of the province, did not exceed that of Miro, one of its subsequent governors; the powers of each were of

the greatest amplitude; each represented the King of Spain and had full power and authority to do in the province all that the sovereign could do.

United States *vs.* Arredondo, 6th Peters, 728, 729, 746, 747.
Murdock *vs.* Gurley, 5th Robinson (La.), 466.
Davis *vs.* Police Jury, 1st Louisiana Annual, 294.
De Armas *vs.* Mayor, etc., 5th La., 132–198.
Choppin *vs.* Michel, 11th Robinson (La.) Reports, 240.

O'Reilly's regulations were not made even for the guidance of himself, as governor, but prescribed rules of conduct for the subordinate officers of the colony. They could in no respect bind or restrain the power of the governors who succeeded him, they possessing the same power as he, O'Reilly, himself possessed, and hence free to modify, abrogate, or by their personal acts disregard his regulations.

Of these latter it has been said that they were the language of a man who supposed himself to possess full power over the subject to which the regulations pertained; that the rules prescribed for himself did not purport to be limits imposed by a master, but to be marked out by his own discretion and to be alterable at his will; that he made no allusion to orders emanating from his sovereign, and, marking out the narrow path he was bound to tread, he gave the law himself in the character of a man invested with full powers.

United States *vs.* Clarke, 8 Peters, 455.

Speaking again of the regulations of O'Reilly, it was said in Delassus *vs.* United States, 9 Peters, 135, that—

"It was apparent that these regulations, were intended for the general government of subordinate officers; not to control and limit the power of the person from whose will they emanated.

"The Baron de Carondelet, we must suppose, possessed all the powers, that had been vested in Don O'Reilly; and a

concession ordered by him, was as valid as a similar concession directed by Governor O'Reilly, would have been. Had Governor O'Reilly made such a grant, could it have been alleged that he had disabled himself, by his instructions for the regulations of the conduct of his subordinate officers; instructions which the power that created, must have been capable of varying or annulling; from exercising the power created in him by the Crown?"

It is known historically that Governor Miro possessed in the colony of Spain all the power and sovereignty that was vested in the king. It has been said that the sovereign power of a State or kingdom which holds public domain for the benefit of the general community is not restricted by forms as to the manner in which they assign or lay out in part land to an individual, in full dominion of property. While it is true that this is generally done by written titles, emanating from proper authorities, it was not in violation of any principle of natural or equity law or of sound policy to say that when part of the public land is separated from the rest by metes and bounds and an individual put in possession of it as his own, he acquires title thereto.

Sanchez *vs.* Gonzales, 11 Martin (La.) Reports, Old Series, 211.

Le Blanc *vs.* Viator, 6 Martin (La.) New Series Reports, 256.

The Spanish government recognized verbal as well as written grants.

Landry *vs.* Martin, 15 La. Reports, page 9, citing Strother *vs.* Lucas, 12 Peters, 437.

It was held in 68 Federal Reporter, 640, 641, that the Filhiol grant was imperfect and incomplete, for the reason that the land conceded was not described with sufficient particularity to identify it or fix its location; that, until actual survey was made of it, it was only a floating and unlo-

cated claim which segregated no specific parcel of land from the public domain.

It appears from the terms of the grant itself that Filhiol had already been placed in possession of the tract by Trudeau, surveyor general, which is an indication of the strongest kind that the land granted was definitely known by metes and bounds, sufficiently at least to enable the grantee to take as well as to be placed in possession of the thing granted. It also appears from the grant that the "governor had prior to its execution made an examination of the proceedings had (or acts done)" by Trudeau, the surveyor general, "concerning the possession which he had given to Senor Don Juan Filhiol, commandant of the post of Ouchita, of a tract of land one league square," etc. Referring evidently to the official governmental survey which was to follow the grant itself, the latter declares "that this land is to be measured so as to include the said locality known by the name of Hot Waters, as is besides stated by the figurative plan and certificate of the said surveyor, Trudeau." This is a clear statement that a plan and certificate of survey had been made by Trudeau prior to the grant, and that this was before the governor when the grant was made, and it is a fair inference that the "proceedings had or acts done" by Trudeau, which, by the opening words of the grant, were declared to have been examined by the governor, were the surveying operations of which the "figurative plan and certificate" of Trudeau supplied the record. The further declaration of the governor in his grant of his recognition of the "figurative plan and certificate" as being in conformity to the order of survey strengthens the assumption that before the grant was executed there had been an official survey of the land for the purpose of fixing its location and boundaries and identifying it to an extent sufficient to inform the governor of the precise location and extent of the tract conceded by the grant. This would appear conclusive from the following language of the

grant, which declared that, using the faculty vested by the king, in the governor, he, in the name of his royal master, granted the league of land unto Filhiol.

It may be said that all of these recitals are simply parts of the grant, which itself is disputed, and that nothing in it can be brought to establish the verity and binding force of the instrument of which they form a part.

In reply it may be stated that whether or not the grant is genuine, if not entirely a question of fact, is one of both law and fact, and predominately of law; the plaintiffs will be entitled to submit to a jury any question of fact concerning the genuineness or validity of the grant in question; this being established, the recitals contained in the instrument would import absolute verity; we have seen that the court will take judicial cognizance of the signatures of colonial governors and higher officials of the Spanish government, in control of the territory of Louisiana, and that any person questioning the same bears the burden of proof to destroy the *prima facie* showing made by the production of an instrument purporting to be the official act of the governor or secretary of the State.

It would appear that a description of land no more precise than that contained in the Filhiol grant has been held by this court to be sufficient; a grant of land by the Spanish governor of East Florida, described as "two thousand acres of land, he (the petitioner) solicits," which in the petitioner's *requette* was described as "two thousand acres of land, in the place called Ockla Waha, situated on the margin of the St. John river;" there was in this case no survey of the land until August 20, 1819, some months after the cession of Florida by Spain to the United States, which occurred February 22, 1819.

U. S. *vs.* Perchman, 7 Peters, 82, 83.

Another fact appearing from the record which would show conclusively that the description, location and boundaries

of the tract in question were fully known and understood by Miro, the governor; Armesto, his secretary; Trudeau, surveyor, and Filhiol, the grantee, is disclosed by the conveyance of Filhiol to Bourgeat, before Texier, military and civil commandant of the district, November 25, 1803, and the retrocession of the property by Bourgeat to Filhiol, before the judge of the court of Pointe Coupee, July 17, 1806.

By the regulation of Morales the comptroller and intendant of the province of Louisiana, in whom at the date in question, November 25, 1803, the power to grant lands had been vested by the king by a royal order of October 22, 1798 (U. S. *vs.* Moore, 12 Howard, 218 *et seq.*) notaries public in New Orleans and commandants of posts were forbidden to take any acknowledgments of conveyances of land obtained by cession, unless the seller or grantor presented and submitted to the buyer the title he had obtained, and, in addition, being careful to insert in the deed the metes and bounds and other descriptions "*which resulted from the title*" and the procès verbal of the survey, which ought to accompany it.

It must be presumed that when Filhiol sold the tract to Bourgeat by a deed passed before Don Vincente Fernandez Texier, military and civil commandant of the district, that the latter proceeded in strict accordance with the above regulation, which appears as article 7 of the instructions of Morales for conceding lands. (See second White's Collection of Laws and Local Ordinances, p. 236.) If Texier followed the instructions enjoined upon him by this article of the regulations of Morales, he required the seller or grantor, Filhiol, to present and deliver to Bourgeat, the buyer, the "title" which he had obtained, and it should be borne in mind that by the word "title" must be considered to mean the legal evidence of the right of Filhiol to the specific tract of land which he was in the act of selling to Bourgeat and which is fully described in his deed to the latter. This appears to have been "a tract of land with a front of eighty-

four arpents, and a depth of forty-two arpents on each side of the stream called 'La Source d'Eau Chaude,' about two leagues distant from its entrance into the Ouchita, *having the Hot Springs for its centre*, its limits extending in parallel lines east and west to its full depth, and bounded on both sides by land belonging to the Crown, the same which to me by virtue of a grant obtained from Senor Don Esteban Miro, the then governor of this province, dated the 12th day of December, 1787." This is shown to have been recorded in the proper office of the province of Louisiana in accordance with the laws then existing, and was also afterwards recorded in the said office; if Texier, the commandant, the representative of the Spanish government, approving or acknowledging the sale of Filhiol to Bourgeat, representing the king himself, observed the injunctions of article 7 of Morales' regulations, the description of the property sold, found in the deed of sale, was taken from the title or grant of Filhiol, since by article 7 the metes and bounds and other descriptions of the property conveyed must be those which result from the title and the procès verbal of the survey which ought to accompany it; the effect of this showing would be to establish that the grant of the governor to Filhiol with the official documents which accompanied it or were executed subsequently as a part of it described the land granted with sufficient particularity to enable Texier, acting for the government, to obtain a particular description therefrom which appears in the deed from Filhiol to Bourgeat.

The failure to produce the figurative plan and survey of Trudeau referred to in the grant evidently for the purpose of a more particular description of the boundaries and location of the tract granted is not sufficient for the dismissal of plaintiffs' suit upon a demurrer; if these documents ever existed at all, their non-production upon the trial sufficiently explained, secondary evidence of their contents would be received; surely the declaration of the plaintiffs' cause of ac-

tion is such that if established by proof on the trial of the merits it would entitle them to a judgment.

The second assignment of error is the following:

"That the court erred in holding, that the said treaty had not guaranteed and protected the said title."

The discussion of this assignment is largely involved in that of the first. If the Filhiol grant was complete under the Spanish government, it segregated from the public domain the land which it covered, and its effect was to make the latter private property. As such it passed from under the Spanish government, when by it the territory was ceded to France, and as such in turn passed to the United States under the treaty of cession. The American Government under the treaty acquired title to public property alone. Private titles were not divested or in any manner impaired by the several changes of sovereignty.

La Vergne's Heirs *vs.* Elkins' Heirs, 17 La. Rep., p. 220.

Riddle *vs.* Ratlif, 8 La. Annual, p. 106.

Murdock *vs.* Gurley, 5th Robinson (La.) Rep., 457; 2 La. Ann. Rep., p. 149; 5th Martin (La.) Rep., p. 653.

Ainsa *vs.* New Mexico, etc., R. R., 175 U. S., p. 81.

By the third article of the treaty concluded between France and the United States April 30, 1803, it was expressly provided that the inhabitants of the ceded territory should be maintained and protected in the full enjoyment of their liberty, property, and the religion they profess.

Treaties and Conventions of the United States, p. 332.

Therefore, if the Filhiol grant was complete before the territory of Louisiana was ceded to the United States, the latter acquired no title to it, and it was beyond the reach or power of Congress or the executive departments.

"That the court erred in holding that this action is barred by the provisions of the act of Congress, approved July 7th, 1870, (16 Statutes at Large)," is the seventh assignment.

The act of 1870 has no reference whatever to the present suit; it authorizes suits against the United States, to be instituted in the Court of Claims, for the recovery of the whole or any part of the four sections of land constituting the Hot Springs reservation.

This suit is not against the United States, although a judgment in favor of plaintiffs would annul the title of the United States; the latter cannot be sued except with its consent; the act of 1870 was designed to permit the government to be sued for the recovery of the whole or any part of the property in question, the suit to be brought, however, within ninety days from the passage of the act; by section one jurisdiction of such suits was conferred upon the Court of Claims.

Plaintiffs are not seeking any remedy which is created by the act of 1870; the suit is not brought against the United States, nor is it instituted in the Court of Claims; the right to bring a suit like the present one existed prior to, and altogether independent of, the act of 1870; plaintiffs seek to avail themselves of no right or advantage conferred by the act of 1870, and hence are not bound by any of its conditions or limitations.

In United States *vs.* Lee, 106 U. S. Rep., page 196, it was held that the doctrine that the United States cannot be sued except where Congress had provided has no application to officers or agents of the United States, who, when, as such, holding, for public uses, possession of property, are sued therefor by a person claiming to be the owner thereof or entitled thereto; but the lawfulness of that possession and the right or title of the United States to the property may by a court of competent jurisdiction be the subject-matter of inquiry and adjudged accordingly. In the course of the opinion in that case it was said that the claim that such a suit could not be maintained against the individuals in possession of

the property, because it was against the Government, was opposed to all the principles upon which the rights of the citizen when brought in collusion with the acts of the Government must be determined; that in such cases there is no safety for the citizen, except in the protection of the judicial tribunals for rights which have been invaded by the officers of the Government professing to act in its name. If such judgments should not be sustained no remedy could be afforded a party, however clear his rights, when it was seen that his opponent was an officer of the United States, claiming to act under its authority (see pages 218, 219); that the defense was based solely upon the immunity from judicial inquiry of every one who asserts authority from the executive branch of the Government, however clear it may be made that the executive possessed no such power; that courts of justice were established not only to decide upon the controverted rights of citizens as against each other, but also upon rights in controversy between them and the Government. (See page 220.)

This case contains reviews of prior decisions, extending as far back as United States *vs.* Peters, 5th Cranch, 115. All going to show that suits of a character like the present may be maintained against the Government by bringing into court its officers or agents who have the custody and are in charge of the property sued for.

In Tindal *vs.* Westley, 167 U. S., 204, the rule announced in United States *vs.* Lee was affirmed, the court declaring that "the settled doctrine of this court wholly precludes the idea that a suit against an individual to recover possession of real property is a suit against the State, simply because the defendant holding possession, happens to be an officer of the State, and asserts that he is lawfully in possession on its behalf."

"Whether the one or the other party is entitled in law to possession, is a judicial, and not an executive or legislative question. It does not cease to be a judicial question, because

the defendant claims that right of possession is in the government of which he is an officer or agent (167 U. S., 221)."

Lee *vs.* United States holds that defendants in possession of property under the United States when sought to be ousted by suit must show that their possession under and on behalf of the United States is by virtue of some valid authority (114 U. S., 289).

"The fact that the defendant in a suit for possession of land, is an officer of the Navy of the United States, and is acting under their orders, gives no justification to the retention of the premises against the claim of the true owners. The Government of the United States is one of law, and its officers cannot deprive any citizen of its property, except as the law authorizes it, and no law can authorize it except upon just compensation to its owners."

San Francisco Sav. Union *vs.* Irwin, 28 Federal Rep., 708–715.

An officer of the United States in charge of a Government armory can be sued for infringement of a patent, although all his acts in relation thereto have been performed under orders of the Government.

Head *vs.* Porter, 48 Federal Reporter, pp. 481, also 482.

See also Tindal *vs.* Westley, 65 Federal Reporter, pp. 231, also 235.

The mere fact that a defendant in ejectment is sued as controller of a State does not deprive the Federal courts of jurisdiction on the ground that the suit is against the State, while it is averred that the defendant withholds possession wrongfully.

Saranac Land & Timber Company *vs.* Roberts, 68 Fed. Rep., 521.

See also Stanley *vs.* Schwalby, 162 U. S., 255.

Respectfully submitted.

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APRIL, 1904.